Supreme Court, U. S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1973

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NO. 73-689

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MICHAEL ANTHONY MANESS,

Petitioner

VS.

THE HONORABLE JAMES R. MEYERS,

Respondent

• • •

On Petition for a Writ of Certiorari to the
169th Judicial District Court of
Bell County, Texas

• • •

BRIEF FOR RESPONDENT IN OPPOSITION

• • •

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OPINION BELOW

The judgment of the 169th Judicial District Court, Bell County, Texas, finding Petitioner guilty of contempt was

entered on Sept. 28, 1973. Said judgment was not reported, but a copy is attached to the Petition herein.

JURISDICTION

As noted above, this Petition was filed on Oct. 24, 1973, and so is timely filed. However, Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution were denied Petitioner in this case.

QUESTION PRESENTED

Respondent disagrees with the composition of the questions which Petitioner asserts to be presented in these certiorari proceedings. Respondent feels that the following question is presented by the facts and circumstances of this cause:

Whether an attorney, who has once advised his client to refuse to obey a subpoena duces tecum on the grounds that obedience of such subpoena would violate the client's privilege against self-incrimination, can then, after the Court has again ordered the client to produce the records sought by the subpoena, advise the client to disobey the Court's direct, in-court order and escape contempt proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution are involved, as well as the Texas Obscenity Statute, Art. 527 of the Texas Penal Code, and the Contempt Statute of Texas, Art. 1911a of the Revised Civil Statutes

of Texas.

STATEMENT OF THE CASE

The judgment for contempt grew out of civil injunction proceedings filed in the 169th Judicial District Court of Bell County wherein the State of Texas sought to enjoin the sale of certain named magazines, the State alleging that such magazines were obscene. In said proceeding, one Michael McKelva was subpoenaed by the State of Texas, the subpoena ordering him to appear in court with some 47 named magazines. McKelva declined to produce the magazines asserting that they might be obscene and that their production would tend to incriminate him. McKelva further said that he was acting according to the advice given him by Petitioner. The Court, Judge Clawson sitting at that time, recessed the Court and ordered the Petitioner to appear within a given time and produce the magazines sought by virtue of the subpoena. When the Court reconvened, McKelva again did not produce the magazines, asserting that he would not do so and further advising the court that he was acting on the advice of counsel, Petitioner herein. Judge Clawson found McKelva, Petitioner and another counsel for McKelva guilty of contempt.

Pursuant to Article 1911a, Vernon's Texas Civil Statutes, the contempt against Petitioner, who is an attorney, must be reviewed by another district judge. This was done by the Honorable James R. Meyers, Respondent herein, who entered the judgment of Sept. 28, 1973, affirming Judge Clawson's initial judgment of contempt and setting the $500 fine. It should be noted that Judge Meyers found as a fact that Petitioner had advised McKelva not to obey the second order of Judge Clawson ordering McKelva to

produce the magazines as called for by the subpoena.

ARGUMENT AND AUTHORITIES

The Judgment of Contempt Which Held Petitioner in Contempt for Advising his Client McKelva to Disobey the State District Court's Second Order to McKelva to Produce the Magazines Sought by Subpoena Duces Tecum, was a Proper Exercise of the Court's Judicial Powers and In No Way Violates Any Constitutional Requirement or Injunction.

It is important to keep this case in perspective. McKelva was ordered to produce some 47 magazines by subpoena duces tecum at a State hearing to enjoin the sale of obscene materials. It was claimed that the magazines were obscene by the State; the Defense claimed that such magazines might be interpreted as being obscene and were therefore self-incriminatory. Accordingly, Petitioner advised McKelva not to produce said magazines under the subpoena duces tecum and when McKelva appeared at the State District Court, he so advised the Court, noting that he was claiming his privilege against self-incrimination on the advice of his counsel. At this time, Petitioner, as counsel for McKelva, did what an attorney should do in representing his client, but it should be remembered that it was not this disobedience of the subpoena that is the subject of the contempt.

After McKelva failed to produce the magazines pursuant to subpoena and advised the Court that he was doing so on the advice of counsel, the Court then ordered him directly, in open court, to produce the magazines and adjourned Court in order to permit McKelva to comply with the Court's order. When Court reconvened, McKelva again

refused to produce the magazines pursuant to the Court's direct order, again acting on the advice of counsel to disobey this second, direct order to produce the magazines. It was this second disobedience of the Court's order that produced the contempt citation against McKelva and caused the Court to hold Petitioner in contempt for advising this second disobedience.

The underlying thrust of Petitioner's contention before this Court is that the first order of the Court, the subpoena duces tecum for the 47 named publications, and the further order of the Court requiring McKelva to produce the named publications were illegal orders since the production of the said magazines pursuant to either the subpoena or the judge's direct order would tend to incriminate McKelva. Accordingly it is argued that, McKelva should be free to disobey the Court's orders and his attorneys, including Petitioner, should be free to advise McKelva to disobey the subpoena and the judge's later order.

This contention is without merit. It should first be noticed that the initial proceeding was a civil proceeding designed to enjoin the sale of the named magazines. In this connection, it is abundantly clear that the magazines had been displayed for sale at the newsstand operated by McKelva. Accordingly, the magazines cannot be considered the private books and papers of McKelva and so the magazines can be in no way equated with the private books-and-papers, self-incrimination principal. See *Katz v. United States*, 389 U.S. 347 (1967); *Lewis v. United States*, 385 U.S. 206 (1966). See also *Anderson v. Coulter*, 499 P.2d 103 (Ariz.Sup.Ct. 1972).

It should further be observed that even in criminal cases,

certain types of evidence of a defendant can be the subject of compulsory production, for example, voice samples, handwriting exemplars, and blood specimens. See *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Schmerber v. California*, 384 U.S. 757 (1966).

The apparent core of Petitioner's argument is that the mere compelling of him to bring anything into the courtroom which might later be used to convict him in a criminal case violates the privilege against self-incrimination. However, this is not a sound and valid argument because, if adopted, the contention could lead to the abolition of all criminal trials. The requirement that a defendant who is on bond must appear in Court at his criminal trial can be said to violate his privilege against self-incrimination (as can a sheriff's or marshal's forced transfer of the prisoner from jail to the courtroom). Requiring the defendant to appear in the courtroom for trial is, under Petitioner's argument, violative of the self-incrimination privilege since eye witnesses to a robbery can point to the defendant as the perpetrator of the crime. This identification would be impossible unless the defendant were compelled to appear in Court. This argument, though absurd, points up the weakness of Petitioner's reasoning that merely requiring him to produce named magazines violates his privilege against self-incrimination.

Finally, as noted earlier, a crucial question in the state proceeding was whether Judge Clawson's orders to produce the 47 magazines were legal or not. A valid order is necessary under Texas law since a person cannot be guilty of contempt if a Court requires obedience to an illegal order. The requirement of a valid order to support a contempt conviction is an unusual facet of the Texas

jurisdiction. In most jurisdictions, including the federal courts, the order disobeyed does not have to be valid and legal to support a judgment of contempt. This rationale is reached because the courts must continue to be the referee of proceedings before them and cannot permit the parties and lawyers to make judicial decisions contrary to the judgment of the Court. Walker v. City of Birmingham, 388 U.S. 307 (1967); Howat v. Kansas; 258 U.S. 180 (1922).

Accordingly, whether or not the orders of Judge Clawson were valid and legal and so binding under the law of Texas does not give rise to a federal question because, under federal law, the invalidity of a judicial order does not vitiate a contempt judgment. Therefore this Court should find against Petitioner because no viable federal question is present to provide a basis for review by certiorari. (Respondent advances the above premise arguendo since Respondent is strongly of the opinion that Judge Clawson's orders to McKelva to produce the 47 magazines were valid orders under any jurisdiction of this country.)

CONCLUSION

For the reasons advanced above, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, Attorney for Respondent, certify that copies of the above and foregoing Brief of Respondent in Opposition have been served by placing same in the United States Mail, postage prepaid, on this the _____ day of December, 1973, to the following addresses: William F. Walsh, 1955 Richmond Ave., Houston, Texas 77006; and Stuart M. Nelkin, Bernstein & Nelkin, 720 Executive Plaza West, 4635 Southwest Freeway, Houston, Texas 77027.

LONNY F. ZWIENER
Assistant Attorney General